S. S.
FILED
DEC 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975.

No. 75-164

PASADENA CITY BOARD OF EDUCATION, et al.,
Petitioners,

v.

NANCY ANNE SPANGLER, et al.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

RAYMOND B. WITT, JR.
Witt, Gaither, Richardson, Henniss & Whitaker
1100 American National Bank Building
Chattanooga, Tennessee 37402
Attorney for The Chattanooga Board of Education

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF FACTS	5
Proceedings subsequent to 2/27/67 Order of the Court of Appeals and Prior to 1971	7
1971 Evidentiary Hearing	8
Proceedings in 1972	11
Proceedings in 1973	13
Proceedings in 1974	15
SUMMARY OF ARGUMENT	16
ARGUMENT	17
AN ANALYSIS OF THE PASADENA OPINION ILLUSTRATES THE NEED FOR CLARIFICATION OF SCHOOL AUTHORITIES AND DISTRICT COURTS ARE TO BE AWARE OF WHAT THE CONSTITUTION REQUIRES OF THEM	17
The Majority Opinion	17
The Concurring Opinion	19
The Dissenting Opinion	20
The Chattanooga Opinions	22
PASADENA AND CHATTANOOGA AS REPRESENTING A CONFLICT BETWEEN THE NINTH AND SIXTH CIRCUITS	24
WHAT CONSTITUTES FULL COMPLIANCE	29
The Nature of the Discrimination which Must be Eliminated (Prior to Full Compliance)	31
After Full Compliance	33
Practicalities	34

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975.

No. 75-164

PASADENA CITY BOARD OF EDUCATION, et al.,
Petitioners,

v.

NANCY ANNE SPANGLER, et al.,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

By consent of the petitioners and the respondents, the Board of Education for the City of Chattanooga, created in 1941 by a Private Act of the General Assembly of the State of Tennessee, files this brief Amicus Curiae.

INTEREST OF THE AMICUS CURIAE

The Amicus Curiae, Chattanooga Board of Education (CBE), has an interest in the Pasadena case for the reason that the Pasadena case has been cited to the United States Court of Appeals for the Sixth Circuit as the basis for staying all action upon a petition for rehearing and suggestion of re-

hearing en banc by plaintiffs-appellants in *James Jonathan Mapp, et al.* v. *The Board of Education of the City of Chattanooga, et al,* Case No. 74-2100. Said petition was originally filed on November 4, 1975,[1] and amended on November 24, 1975,[2] pursuant to the appellate court's grant of an extension of time. The petition is directed to the appellate court's opinion of October 20, 1975.[3]

Secondly, CBE understands that this Court has been advised by counsel for the Pasadena Board of Education of said opinion of October 20, 1975; and further with a suggestion that the *Mapp* decision is in conflict with the *Spangler* decision of the United States Court of Appeals for the Ninth Circuit, 519 F.2d 430 (5-5-75) in which case this Court granted certiorari on November 11, 1975, pursuant to petition of the Pasadena School Board.

CBE has been in court for fifteen years, since April 6, 1960. CBE has always complied with the United States Constitution once what the Constitution required in school desegregation cases was clarified by the district court. There is nothing in the long record of this case even to suggest to the contrary. Dual zones were terminated in September of 1966. Faculty and staff desegregation upon a voluntary basis was initiated thereafter. Subsequent to *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, (1971), faculty and staff were racially balanced pursuant to court order. Currently elementary and junior high schools are desegregated pursuant to a plan initially approved by the district court on July 26, 1971,[4] affirmed en banc by the Sixth Circuit on April 30, 1973,[5] with

[1] Motion for rehearing or rehearing en banc and leave to file Amendment to this Motion out of Time. Appendix A.

[2] Amended Petition for Rehearing and suggestion of Rehearing En Banc. Appendix B.

[3] Opinion of 6th Circuit of 10-20-75. Appendix C.

[4] 329 F. Supp. 1374.

[5] 463 F.2d 745.

certiorari denied by this Court on November 12, 1973,[6] reaffirmed by the district court on November 16, 1973,[7] and now stands re-affirmed by the Sixth Circuit in its opinion of October 20, 1975, (as all three judges agreed as to elementary and junior highs) the opinion which plaintiffs-appellants are now seeking to have reheard.

The high school plan was approved tentatively in the decision of July 26, 1971, with such tentative approval subsequently being affirmed on appeal and by the denial of certiorari. The high school plan as implemented was given final approval by the district court on November 16, 1973, and now stands affirmed by the 2-1 decision of the Sixth Circuit on October 20, 1975.

Uncertainty as to what the United States Constitution requires in school desegregation cases continues. The current petition to rehear, and in effect, to stay the rehearing, compounds the uncertainty for the CBE. The continuation of the atmosphere of doubt, confusion, and uncertainty must necessarily diminish the quality of the educational opportunity offered each passing day within the school system, and to the detriment of all of us. And such is the essence of the Constitutional right in question.

The issues raised by Pasadena in its petition are desperately in need of clarification, an eventuality recognized by this Court in 1971, *Swann,* supra p. 14;

> "The problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, *however incomplete and imperfect,* for the assistance of school authorities and courts." (emphasis added)

Too great an importance cannot be ascribed to the issues with reference to the administration of school desegregation plans by Federal Courts. Circuit Judge Chambers' reference

[6] 414 U.S. 1022.

[7] 366 F. Supp. 1257.

to the courts "grading students' papers" should not be dismissed lightly.

District and appellate courts have consistently given their attention to racial balance reflecting extreme caution before approving any slight deviation from a precise racial balance. Judge Real's commitment to no majority black schools as an ironclad, continuing requirement is classically illustrative of lower courts' rigid interpretation of the racial balance language in *Swan,* supra. Nothing could be more mechanical and inflexible in practice.

Mechanical approaches to a Constitutional remedy in the field of education are dangerous, substituting a formula for a sophisticated individual judgment. But this is the pattern.

Lower courts have tended to ignore the default portions of the *Swann* rationale, equating numerical results with compliance while excluding any consideration of practicalities and basic reality, sometimes deciding as if segregation was per se unconstitutional even if in no way attributable to official action or inaction. If the "year-by-year adjustments" portion of *Swann* is to prove administratively feasible, some clarification is essential as to what constitutes compliance. Until this issue is clarified, federal courts will continue to move toward "grading students' papers."

Freedom of choice is not per se unconstitutional. Again, the obsession with numbers causes courts to ignore the educational utility inherent in freedom of choice. In fact, this Court has impliedly approved freedom of choice in the majority the minority requirement in every desegregation plan.[8]

However, school systems differ. School boards differ. All have not reacted to *Brown I* and *II* in the same manner. This Court recognized this distinction in the frequent references to default in the *Swann* decision.[9]

---

[8] *Swann,* Supra, p. 26.

[9] "Judicial authority enters only when local authority defaults." (p. 16).

"• • • that the School Board had *totally defaulted* in its acknowledged duty to come forward with an acceptable plan of its own. • • • It

CBE is fearful that the Pasadena decision may well decide the Chattanooga case, or that the district court or the Sixth Circuit will so interpret the Pasadena decision although the history of the two cases reflects many and essential differences. Obviously the plaintiffs believe such eventuality is possible and to their liking. But would Chattanooga have ever been given the opportunity to have these evolving Constitutional principles interpreted in the light of the Chattanooga facts, uninfluenced by the actions of a school board in a community on the other side of the country? Favorable actions upon a petition by a school board for certiorari is infrequent. Hence CBE feels constrained to call the Chattanooga facts to the attention of this Court in this case.

STATEMENT OF FACTS

The Chattanooga suit was initially filed on April 6, 1960, by James R. Mapp as father and next friend of James Jonathan Mapp and Deborah L'Tanya Mapp, minors, and others on their own behalf and on behalf of all other Negro children and their parents in the City of Chattanooga who were similarly situated and affected by the policy practice, custom, and usage complained of. An injunction was requested against the operation of a compulsory bi-racial school system through the maintenance of a dual pattern of school zone lines based upon race and color, and against the assignment of pupils to schools on the

---

was because of this *total failure* of the school board that the District Court was obliged to turn to other qualified sources • • •." (Emphasis ours) (p. 24).

"In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised *only* on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters *only* when local authority defaults." (Emphasis ours) (p. 16).

"• • • to review important issues as to the duties of school authorities and *the scope of powers of federal courts* under this Court's mandates to eliminate racially separate public schools established and maintained by state action." (Emphasis ours) (p. 5).

basis of the race and color of the pupils. In the alternative, plaintiffs requested that CBE present a plan for reorganization of the system into a unitary non-racial school system providing for assignment of children on a non-racial basis.

The suit was filed under authority of 28 U.S.C. 1983 and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

CBE admitted the operation of a bi-racial school system and submitted that it had been, and was then, conducting a program of "elucidation" to prepare the community of Chattanooga for the initiation and carrying out of, and acceptance of, the student desegregation commanded by the *Brown* decision.

CBE represented that further time was needed to continue the elucidation responsibility so that student desegregation might have a reasonable chance of success with minimum harm to the quality of the educational opportunity as more of the community came to accept the requirements of the constitution.

On October 21, 1960, the district court granted the plaintiffs' motion for summary judgment and directed CBE to submit a plan of desegregation, and it was filed on December 20, 1960. This plan was disapproved and the Board was given sixty days within which to submit another plan. The Circuit Court of Appeals sustained the district court's order, 295 F.2d 617 (1961).

A hearing was held on February 1 and 2, 1962, after which the district court approved the desegregation plan in part. Said plan was gradual and involved the desegregation of sixteen selected elementary schools in September of 1962 in grades 1, 2 and 3, followed by desegregation of all four grades of all elementary schools in September of 1963 and the remaining elementary grades in 1964. The Plan proposed to desegregate the first year of junior high in 1965, the remaining junior high grades in 1966, first year senior high in 1967, the remaining high school grades in 1968 and the Chattanooga Technical Institute in 1969.

An appeal was taken by both parties. The gradual plan was approved upon appeal with the exception of technical and vocational courses and the case was remanded for further proceedings with respect to them. 319 F.2d 571 (1963).

Under date March 29, 1965, the plaintiffs filed a Motion for Further Relief seeking acceleration of desegregation so that complete desegregation would be effected by September 1965 and for teacher and pupil assignments to be made "without regard to race" and that all racial classifications be eliminated from the operation of the public school system. The district court granted the accelerated relief requested, requiring the complete elimination of dual zones in all grades by September 1966. The Court denied relief on the issue concerning faculty desegregation.

The court of appeals affirmed[10] the judgment of the district court with the exception of the issue of faculty assignments as *Bradley* v. *School Board of City of Richmond*, 382 U.S. 103 (1965), had been decided since the district court decision was filed.

PROCEEDINGS SUBSEQUENT TO 2/27/1967 ORDER OF THE COURT OF APPEALS AND PRIOR TO 1971

On March 29, 1967 the district court entered an order finding that the single question left for decision was faculty assignment. On September 12, 1967 CBE proposed an offer of judgment regarding the faculty issue. Such was neither accepted nor rejected by plaintiffs.

On November 23, 1970 plaintiffs filed a Motion for Summary Judgment contending that the desegregation plan had proven ineffective to accomplish its purpose, that is the establishment of a unitary school system in the City of Chattanooga, such motion apparently being based upon *Green* v. *School Board of New Kent County*, 391 U.S. 430, 437-8 (1968), which charged de jure school boards with "the affirmative duty to take what-

[10] 373 F.2d 75, 76 (1967).

ever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."

The district court denied the Motion for Summary judgment (2/19/71) but set the case for evidentiary hearing and specified the issues for trial, placing the burden of proof upon the Board to show that its actions had met the obligation to establish a unitary school system.

As invited by the District Court, the Board responded:

> "If the affirmative duty referred to by the Supreme Court does encompass affirmative decisions by the Board based solely upon race, and coupled with compulsion by the Board in order to increase the number of whites in all-black high schools and the number of blacks in formerly all-white high schools, then defendant Board would not have met its affirmative responsibility to establish a unitary school system when this concept is so interpreted as to require a recognition of race." (3/8/71) Appendix in Sixth Circuit Nos. 71-2006, -2007, p. 87.

1971 EVIDENTIARY HEARINGS

The evidentiary hearing was held on April 14, 1971, May 11-19, 1971 inclusive, some eighteen days after this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). Following this hearing Judge Wilson found that defendant had not complied with the constitutional responsibility to establish a unitary school system and ordered submission of a new plan of desegregation to "maximize integration". On June 16, 1971, said plan was filed incorporating racial gerrymandering of zones and the assignment (and transportation) of students, faculty and supervisory personnel solely upon the basis of race in order to increase both student and faculty racial desegregation. A hearing was held on July 16, 1971 on the acceptability of the Board's amended plan along with the plaintiffs' objections thereto.

On July 26, 1971 the Court approved all substantive portions of the amended plan, 329 F.Supp. 1374, except the high

school portion, and ordered the plan implemented to the extent possible by September 1971. The plaintiffs appealed objecting to the inadequate degree of student desegregation (racial imbalance) to be accomplished by the plan as approved. Objection centered on those elementary schools where the racial proportion would be less than 30% of either black children or white children. The schools included were Barger, 20% black; Carpenter, 14% white; Long, 16% black; Rivermont, 12% black; Sunnyside, 15% black. The district court said:

> "With regard to the five elementary schools that will retain racial ratios of less than 30% or more than 70% of one race, the Court is of the opinion that the Board has carried the burden of establishing that their racial composition is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such result is the consequence of demographic and other factors not within any reasonable responsibility of the Board."

As was found by Judge Wilson, all of the remaining twenty-seven elementary schools under the plan "will have racial ratios of not less than 30% nor more than 70% of any race in each school." (p. 1383).

The district court went on to say:

> "To the extent that any student racial imbalance exists in any of the elementary schools, the Court is of the opinion that the Board has carried the burden of establishing that such racial imbalance as may remain is not the result of any present or past discrimination upon the part of the Board or other state agency. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency." (p. 1383).

The treatment of the junior high schools was substantially in the same manner as that of the elementary schools. Only

Hardy, 27% white; Dalewood, 29% black, and Long, 15% black, deviated from the 30-70 percent ratio. At page 1384 the court said:

> "In the light of all the record, the Court is of the opinion that the junior high school plan as submitted by the defendants removes all state created or state imposed segregation. To the extent that any student racial imbalance exists in any of the junior high schools, the Board has carried the burden of establishing that such racial imbalance as remains is not the result of any present or past discrimination upon the part of the Board or upon the part of other state agencies. Rather, such limited racial imbalance as may remain is the consequence of demographical, residential, or other factors which in no reasonable sense could be attributed to School Board action or inaction, past or present, nor to that of any other state agency. The Court is accordingly of the opinion that the defendant's plan for desegregation of the Chattanooga Junior High Schools would eliminate 'all vestiges of state imposed segregation' as required by the *Swann* decision."

As to the high schools, zoning was introduced for the first time in the Chattanooga system in order to achieve greater student desegregation with the plan proposing:

	Black Students	White Students
Brainerd High	32%	68%
Chattanooga High	44%	56%
Howard High	75%	25%
Riverside High	75%	25%

The court was concerned as to whether the students and the statistical data upon which the CBE plan was based would "correspond with actual experience." Thus the court gave tentative approval only to the desegregation plan at the high school level.

The plan proposed limited transportation for elementary and junior high school students because of pairing, clustering,

and racial assignment of students. With reference to transportation the court's decision stated as follows:

> "The defendants will accordingly be permitted to implement such portions of its elementary and junior high school plans as may be feasible with the transportation facilities reasonably available to it at the commencement of the September term of school, and will be permitted to delay the implementation of any remaining portions of the said student assignment plans in the elementary and/or junior high school until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, and until such facilities can be placed in use with safety and with a minimum of interruption of the educational program. As soon as the defendants can formalize their plans in this regard, and in no event later than within thirty days, the defendant will advise the court of their proposed implementation schedule in accordance with the foregoing." (p. 1388).

By order of August 5, 1971, the district court permitted delay as to transportation "until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, . . ." (Appendix in Sixth Circuit Nos. 71-2006, 2007, Vol. I, p. 215).[11]

PROCEEDINGS IN 1972

A proceeding in state court resulted in an injunction against the Commission of the City of Chattanooga from providing any public funds to transport school students for the purpose of achieving racial balance. On January 24, 1972, CBE filed a "Status Report on Amended Plan of Desegregation and Motion for Further Instructions" bringing the state court decision

[11] References are to the appendix and transcript of the appeals to the United States Court of Appeals for the Sixth Circuit as indicated.

and injunction to the attention of the Federal district court. Further proceedings were had at the district court level as a result, but such proceedings are not germane to the present appeal, except that in the district court opinion filed on February 4, 1972, the district court, 341 F.Supp. 193, 200, directed that its order of August 5, 1971, be fully implemented no later than the fall term of school in 1972, unless otherwise directed by United States Court of Appeals.

On May 18, 1972, CBE filed a report as required by the opinion of February 4, 1972, with reference to "any racial imbalance remaining in the four general purpose high schools." The report referred to a statistical report entitled "Tenth Day of School Enrollment Report 1971-72 School Term" dated September 23, 1971, and filed with the court on September 24, 1971, coupled with a supplementary statistical analysis dated March 17, 1972, and entitled "Summary Analysis of Senior High Schools 1971-72 Enrollment of 1970-71 Pupils Projected to Enroll."

Oral argument before the court of appeals in Nos. 71-2006, 2007 took place on June 5, 1972.

CBE filed a Motion for a Limited Stay on June 23, 1972, pursuant to Section 803 "Provision Relating to Court Appeals, Title 8 — General Provisions Relating to the Assignment of Transportation of Students" of Education Amendments of 1972 as passed by the United States Senate on May 24, 1972, the House of Representatives on June 8, 1972, and as signed by the President of the United States on June 23, 1972. A hearing was held on said motion and other pending motions on July 27, 1972. Lengthy briefs were filed by the parties and on August 11, 1972, the district court granted CBE's Motion to Stay, but limited to "only of such portions of the previous orders of this Court as necessarily involve the transportation of elementary or junior high school students, such stay being subject to the further orders of this Court." Plaintiffs filed Notice of Appeal from said order on August 17, 1972.

A report entitled "Submission of Student Desegregation Statistics by Defendant as of the Tenth Day of School, 1972-73, U.S. Department of Health, Education, and Welfare School System Summary Report" and explanatory material was filed with the district court under date December 4, 1972, containing the statistical facts evidencing the response of students to the desegregation plans in the second year of partial implementation.

On October 11, 1972, the case was remanded to the district court by a 2-1 decision. Subsequently the plaintiffs filed a Motion for Rehearing and suggestion of an en banc hearing. Such was granted and on December 14, 1972, oral argument took place before the Sixth Circuit Court of Appeals in Cincinnati sitting en banc.

PROCEEDINGS IN 1973

Oral argument before this Court in the *Richmond* case, (*School Board of the City of Richmond, Va., et al.* v. *State Board of Education of Virginia, et al.*, 412 U.S. 92 (1973)) took place on April 23, 1973. The en banc decision of the Sixth Circuit reversing a 2-1 decision of the three-judge panel and affirming the district court was filed on April 30, 1973, 477 F.2d 851. The following appeared in said decision:

> "The Board of Education has filed a supplemental record in this court containing statistics said to reflect changes which have occurred after the decisions of the District Court. We decline to consider these statistics in the present appeal. Appropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court. We re-emphasize the holding of this Court in *Kelley* v. *Metropolitan Board of Education of Nashville and Davidson Country*, supra:
>
> > 'Like most decrees in equity, an injunctive decree in a school desegregation case is always subject to modification on the basis of changed circumstances.' 463 F.2d at 745-46."

Under date May 31, 1973, counsel for CBE submitted an

opinion in letter form to defendant entitled "Suggested Procedure for Board Analysis of Proposed Amendments to Plan of Desegregation and Educational Reasons Therefor." (Tr. 828, Exhibit 18).[12] The defendant was reminded that in *Brown II* "the primary responsibility for elucidating, assessing, and solving these problems" was clearly placed upon school authorities, the clear implication being that initiation of solutions was the responsibility of school authorities and not the district court. The thrust of the opinion was to advise CBE as to the steps needed to be taken if CBE was to meet its constitutional obligation under *Brown I* and *II* in seeking to find a workable solution to compensate for the dual school systems operated prior to September of 1963-66 in Chattanooga – taking into account the changed circumstances since initial and partial implementation of the 1971 desegregation plan, or represented by the loss of one-third (1/3) of the white student population in only two years.

The above recommendation by counsel was considered at a meeting of the Chattanooga Board of Education on June 13, 1973 and the unanimous decision was made to accept said recommendation.

Subsequent board meetings were held on June 19, 1973, June 26, 1973, July 3, 1973, July 9, 1973, and July 11, 1973 on which date the proposed adjustments to the June 16, 1971 plan of desegregation were unanimously agreed upon by a board composed of four whites and three black members, for presentation to the district court.

On July 20, 1973, CBE filed its Motion for Further Relief: to Adjust Amended Plan of Desegregation as Filed June 16, 1971, and Brief in Support of Said Motion for Further Relief (A-8-33).[13] An evidentiary hearing was held on October 2, 3, 4, 5, 9, 10, and 11 and thereafter a Memorandum Opinion denying CBE's motion was filed on November 16, 1973, 366

[12] No. 74-2100-2101 — U.S. Court of Appeals for Sixth Circuit.

[13] Ibid.

F. Supp. 1257, followed by final order on December 18, 1973 (A-435).[14]

Plaintiffs filed their motion to amend the Memorandum Opinion of November 16, 1973 and for new trial and for further relief on December 26, 1973 (A-438).[15] Thereafter on January 7, 1974 said motion was supplanted by an amended motion to amend for a new trial and further relief (A-441).[16]

While the above events were taking place at the district court level, CBE had filed a Petition for Writ of Certiorari with this Court, said case being docketed on July 25, 1973. Such petition was from the en banc affirmance by the Court of Appeals for the Sixth Circuit entered on April 30, 1973. 477 F.2d 851 (1973). Certiorari was denied by this Court on November 12, 1973, 414 U.S. 1022.

PROCEEDINGS IN 1974

On June 20, 1974, Judge Wilson filed a Memorandum on Pending Motions finding that plaintiffs' Motion and Amended Motion for a New Trial or for Further Relief of January 7, 1974 was without merit and should be denied. On July 12, 1974 the plaintiffs' notice of appeal (No. 74-2100) from Judge Wilson's denial of the Motion as set forth above was filed. On July 22, 1974 CBE's notice of appeal (No. 74-2101) from the order of December 18, 1973 was filed. The appellate oral argument was on April 18, 1975 with the opinion being rendered on October 20, 1975. The plaintiffs' "Motion for Rehearing or Rehearing En Banc" was filed on November 4, 1975 with an "Amended Petition for Rehearing and Suggestion of Rehearing En Banc" being filed on November 24, 1975 pursuant to a grant of extension of time in which to file having been noted on November 4, 1975.

[14] Ibid.

[15] Ibid.

[16] Ibid.

Plaintiffs' petition for a rehearing in No. 74-2100 called the attention of the court of appeals to the fact that this Court had granted Certiorari on November 11, 1975 in *Pasadena City Board of Education, et al.* v. *Spangler, et al. and United States,* No. 75-164, going on to request a delay in action upon such petition to rehear until *Pasadena,* supra, was decided.

SUMMARY OF THE ARGUMENT

While the *Spangler,* supra, opinion is limited severely in its scope, and while its authority is further restricted by the reasoning in the majority opinion as well as in the concurring opinion, nevertheless the net effect of the opinion is to require Pasadena to undertake a student reassignment as a constitutional obligation because a "fixed mathematical racial balance" has been exceeded. There is no way to interpret this impact upon Pasadena other than a violation of the clear language used by this Court in *Swann,* supra.

And of greater significance, the effect of the opinion is to remove state action and causation from any consideration in school desegregation cases. Specific language in *Green,* supra, and *Swann,* supra, is thereby effectively ignored as irrelevant and no longer of any constitutional significance.

The conflict with the Sixth Circuit in *Mapp,* supra, is obvious for the essential character of the continuing presence of state action is there recognized and not ignored for its absence is the basis for approval of the racial results in two Chattanooga high schools subsequent to affirmative effort. An additional support for the *Mapp,* supra, decision by the Sixth Circuit is its awareness that racial balance was truly "a starting point" and not a constitutional requirement as this Court emphasized in *Swann.*

This Court also recognized in 1971 that Swann provided guidelines only, that such were incomplete and imperfect, and thus that further clarification would become essential in the future. CBE suggests to this Court that Pasadena provides the opportunity to clarify the nature of a school board's continuing constitutional obligation under *Brown I* and *II,* and

its progeny. The clarification is essential if school authorities and district courts are to be able to perform their respective functions so that educational opportunity and educational quality can regain their central importance in public education.

More specific guidelines are urgently needed as to: (1) what constitutes full compliance; (2) the restrictions upon the use of racial balance; (3) the constitutional right and state action; (4) the constitutional remedy, state action, causation and practicalities; (5) continuing default after affirmative action; (6) the burden of proof before compliance and after compliance; and (7) when court supervision may be terminated.

CBE is fearful that additional guidelines generated by the facts in *Spangler,* supra, could be expanded and misinterpreted by lower courts as Swann has been since 1971. Such a result could operate to the permanent detriment of the educational opportunity of the school children in the Chattanooga system.

ARGUMENT

AN ANALYSIS OF THE PASADENA OPINIONS ILLUSTRATES THE NEED FOR CLARIFICATION IF SCHOOL AUTHORITIES AND DISTRICT COURTS ARE TO BE AWARE OF WHAT THE CONSTITUTION REQUIRES OF THEM.

Precisely what the Ninth Circuit Opinion in the Pasadena case is authority for requires careful analysis.

THE MAJORITY OPINION

Circuit Judge Ely at the onset of his opinion pointed out the need "to underscore the narrow ambit of our review, a construction resulting from the procedural posture in which this appeal is before our court." *Spangler* v. *Pasadena City Board of Education,* 519 F.2d 430 (5/5/75). p. 431 The opinion is quite specific in describing what is before the court.

> "The only question before us now is whether the District Court erred in its determination, in denying appellants' 1974 motions, that events and circumstances occurring and existing in Pasadena since the Pasadena Plan was ordered implemented do not justify relief from the January 23, 1970, Decree, relinquishment of the court's continuing jurisdiction over the Board, or the substitution of a substantial alteration of the original Pasadena Plan." p. 431

However, since the court of appeals affirmed the district court opinion, the net effect of the affirmance is to place the stamp of approval upon a plan which included a mathematical racial balance in the sense that majority black schools were declared unconstitutional per se without any necessity of giving consideration to the cause thereof.

The opinion contains a further restrictive aspect when on page 434, after stressing the fact that the appellate court is "compelled to apply the clearly erroneous test to the trial judge's resolution of the factual issues raised by conflicting evidence bearing on the question of changed conditions", the court further limits its affirmance of the district court's denial of the motion, to "insofar as that motion sought relief from the Orders of January 23 and March 10, 1970, and dissolution of the injunction requiring that there be no school in Pasadena wherein the student body consisted of a majority of minority race." (p. 434)

After reciting factors in the record supporting the district court's opinion as well as the fact that it was not "clearly erroneous"; and after further pointing out that "we cannot conscientiously hold that the district judge abused his broad equitable discretion . . ." page 437, Judge Ely again limited the decision by saying:

> "We must therefore expressly disapprove such portions of the record as suggest that the district judge interprets his injunction to require continuous annual redistricting."

In referring to the district judge's reference to the fact that there would be no majority of any minority in any school in Pasadena "during my lifetime," Judge Ely noted the apparent spontaneity in the remark and went on to say that such:

> ". . . cannot be broadly interpreted, inasmuch as it suggests that even after the court has determined that its plan has been effectively implemented and racial discrimination eliminated from the system, a disruptive juggling of students to correct *de minimis* alterations in racial balance in specific schools might be required annually, or even day by day. This is precisely *what we interpret Swann to prohibit.*" (Emphasis added)

THE CONCURRING OPINION

The foregoing analysis is evidence of the narrow basis for the 2-1 affirmance. However, such also is reinforced by the separate concurring opinion of Circuit Judge Chambers. Being mindful of Federal Rule of Civil Procedure 52(a) and the obvious broad discretion granted to district court judges in desegregation cases by the *Swann* opinion, Circuit Judge Chambers did concur, but he said he would accept only one more student reassignment:

> "But I cannot go along with an order continuing, except for a short time, *beyond one more reassignment* of pupils that is found to be in compliance. Prospectively, I reject the edict that there shall never be a particular school with a 'majority of any minority' or majority of any minority as long as '[the district judge] live[s].' Never is a long time." (Emphasis added) (p. 440)

Judge Chambers followed this with these revealing words:

> "I interpret Judge Ely's opinion as requiring a termination of the mandatory injunction within a very short time after the school again gets in compliance and I think the message is clear to the district court." (p. 440)

His concern is vividly expressed in this language:

> "Next thing we shall find ourselves grading students' papers – if we keep the schools under a court decree at all times." (p. 440)

Thus, Judge Chambers was just barely persuaded to vote to affirm the district court; and would permit only one more reassignment. If Judge Chambers had not been willing to permit one more reassignment then he would have had to have joined Judge Wallace in dissent and the opinion would have been to the contrary, reversing District Judge Real. The comment also indicates that Judge Chambers assumed that a reassignment would be necessary to correct the majority black schools existent in the Pasadena system at that time. He also assumed that Pasadena had been in compliance at some time by the reference to "after the school *again gets in compliance.*"

In the concluding portion of Judge Chambers' opinion, he makes an oblique reference to causation by indicating his interpretation of the Constitution to be such that racial changes in schools solely because of shifts in residential patterns is not unconstitutional.

> "I have some doubt that one will find any de jure segregation after the decree has been complied with again if all that is done is to let residence patterns shift by themselves."

THE DISSENTING OPINION

The thrust of the dissenting opinion by Circuit Judge Wallace lends support to the judgment that the Pasadena case rests on a very narrow basis, pointing out that his disposition would not jeopardize the desegregation already achieved "nor that still necessary to remedy any de jure segregation which may remain in the Pasadena schools." page 441. Judge Wallace also stated that he would reverse and remand the district court because the district court failed to apply the proper test. The test as seen by Judge Wallace is included in the following quote:

> "The test for retaining jurisdiction and continuing a desegregation injunction in effect is not the school district's maintenance of an inflexible racial balance but whether 'the affirmative duty to desegregate has been accomplished and racial discrimination *through official action* is eliminated from the system.'" (p. 441) (Emphasis added).

The dissent points out that the district court opinion is based upon the premise that de facto and de jure segregation are indistinguishable. Judge Wallace says such is a "fundamental flaw.":

> "But we have rejected the equivalence of de facto and de jure segregation and have held that segregation in public schools is unconstitutional only if it is de jure segregation; that is, only if it results from intentionally segregative state action.
>
> "Thus the justification for the desegregation decree in this case must be the de jure segregation found in 1970, not de facto segregation existing before or after that date."

After citing four decisions of this Court impliedly to support such conclusion, the dissent also takes issue with the departure of the district court from this Court's direction to use mathematical ratios as "no more than a starting point."

After the foregoing analysis, the net effect of the Pasadena decision in its present posture is that a mathematical racial balance has become a Constitutional requirement in that school system. What can be more precise than the change in the race of one student having the effect of shifting a school system from a constitutional posture of compliance to the unconstitutional posture of non-compliance; and particularly when this shift requires an adjustment throughout the entire school system? It would appear reasonable to say that the Ninth Circuit decision is a flagrant violation of this Court's disapproval of "a fixed mathematical racial balance," *Swann*, page 23-24.

Consequently, until this Court decides otherwise, a fixed mathematical racial balance has been *the deciding factor* in Pasadena.

In order to gain proper judicial prospective, however, another ingredient must be added. Not only has the change in the color of one student moved a board from the status of compliance to non-compliance, such result has occurred without any reference to causation. There is no mention of causation by Judge Real in his opinion. And what does this mean? That the district judge assumed a causal connection between state action in some form and the student bodies in several schools becoming majority black? Or that Judge Real subconsciously reflects his conviction that state action is no longer an essential element? Perhaps he reads *Brown I* and *II* and *Swann* as requiring the state action element initially to establish default, and thereafter there is a legal presumption that it continues to persist indefinitely. Under such theory the stain of history continues to convict succeeding generations no matter how valiant may have been the intervening effort to remedy a past wrong. Can this possibly be the justice that the Constitution was created to support?

THE CHATTANOOGA OPINIONS

If we contrast the opinions in the Chattanooga case, both that by Judge Wilson at the district court level and that of the court of appeals, it is significant that both opinions specifically address their attention, as well as the language of the decisions, to the question of causation. A racial disproportion did exist at Riverside and Howard and its undesirable character was acknowledged by all parties. However, such was found not to violate the Constitution for the reason that the state action element was absent. In fact, the racial imbalance persisted in spite of affirmative state actions specifically designed to remedy the objectionable racial balance. There was also a serious question as to whether a sufficient number of white high school students were then available

within the system to remedy the racial imbalance at Riverside and Howard.

As a result there is no doubt that, in the Sixth Circuit, in order for racial segregation to be unconstitutional there must be facts to support a conclusion that such segregation was caused by state action and thus is de jure as reflecting segregative intent of the state as contrasted with de facto as reflecting the absence of segregative intent by the state. On the other hand, in the Ninth Circuit, once segregative intent, state action, de jure segregation have been found to exist, whenever an objectionable degree of racial imbalance occurs in the future, seemingly it will be presumed that the requisite state action persists merely from the fact of the existence of the racial imbalance. Thus, under such circumstances, racial segregation may be characterized as per se unconstitutional, a position that this court has refused to adopt in its reliance upon the Fourteenth Amendment and its reference to state action.

If we can assume that members of school boards generally intend to comply with their oaths of office to support the Constitution of the United States, and if we further may assume that they must then turn to their own legal counsel for guidance as to exactly what the Constitution requires of them, how does a lawyer interpret the Pasadena decision as applicable to his client and its duty to implement school desegregation? After interpreting the Pasadena district court opinion, the majority opinion of Circuit Judge Ely, the separate concurring opinion of Circuit Judge Chambers, and the dissenting opinion of Circuit Judge Wallace, legal counsel must consider the Chattanooga Sixth Circuit opinion, as well as the Atlanta decision of the Fifth Circuit.[17] Then what does he advise his client?

As Circuit Judge Chambers said, "This is sad business."[18]

---

[17] *Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 10-23-75).

[18] *Spangler*, supra, p. 440.

Clarification is needed for the guidance of school authorities and for district courts for they together represent the front line where the principles enunciated in *Brown I and II* and *Swann* finally become a reality for the school children whose future is now, in the quality of their present educational opportunities.

PASADENA AND CHATTANOOGA AS REPRESENTING A CONFLICT BETWEEN THE NINTH AND THE SIXTH CIRCUITS

In its Petition for Writ of Certiorari Pasadena stated the second question presented to be "Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which the school system is in no way responsible?

The plaintiffs-appellants in the Chattanooga case have cited this particular question as the basis for their requesting the United States Court of Appeals for the Sixth Circuit to stay further consideration of the plaintiffs-appellants' petition for rehearing of the opinion of October 20, 1975, (App. C).

There is a suggestion that the Pasadena decision conflicts with the Chattanooga decision, and on this particular question presented. It is possible to construe the Pasadena District Court decision, as affirmed by the appellate court, as requiring the Pasadena system to adjust its desegregation plan to avoid the constitutional violation found to be implicit in the fact that Pasadena has a number of schools with a majority black student body, and such was clearly declared unconstitutional by the district court in the Pasadena case. The key words in the question presented are: ". . . for which the school system is in no way responsible". If the Pasadena case is construed as requiring Pasadena to adjust its desegregation plan, such is tantamount to a requirement for annual adjustments even though the Pasadena Board is in no way responsible for the changes that occur.

Now what does the Chattanooga case hold with reference to this particular question? In giving final approval to the high school plan, Judge Wilson had this to say:

> "However subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become causative factors for the present racial composition of the student body in those schools (Riverside and Howard) and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the Plan previously approved included provision for students to elect to transfer from a school in which they were a majority to a school in which they would be in a minority." 366 F. Supp. 1257 (11-16-73, at page 1261)

The court of appeals quoted from this portion of Judge Wilson's opinion and then had this to say:

> "While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board." (App. C-3, 4)

The Sixth Circuit affirmed Judge Wilson and in doing so clearly found that the district court's actions complied with the Constitution. Such is reflected in the following quote:

> "Having implemented the plan for desegregating the high school by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, having provided further for continuance of a majority to minority transfer policy, the district judge conceived that he had obeyed the mandate

of *Brown* v. *Board of Education of Topeka, II*, 349 U.S. 294 (1955) *Brown II* and more particularly of *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1971). So do we." (App. C-5)

It is clear that in the Chattanooga case, both from the district court opinion and from the opinion of the court of appeals that the answer to the above question as presented is "no" and without any qualifications.

The objectionable racial proportion already existed in Chattanooga at the time the plan was designed. Consequently, the plan was designed to correct an existing condition. Such is contrary to the facts in Pasadena where the objectionable condition arose as a result of the operation of the plan.

In Chattanooga, the objectionable condition continued after a specific remedy had been designed and fully implemented in order to correct the objectionable racial ratio. No affirmative action has been taken to correct the objectionable racial ratio at Pasadena as such remains for future action of the Pasadena Board dependent upon the outcome of the Pasadena case now before this court.

Both appellate courts relied upon Fed.R.Civ.P. 52(a), the Ninth Court saying:

> ". . . we are compelled to apply the clearly erroneous test to the trial judge's resolution of the factual issues raised by conflicting evidence bearing on the question of changed conditions." *Spangler*, supra, p. 434.
>
> "Applying the above standards to the case at hand, it would constitute an abuse of our power to hold that the District Court was clearly erroneous in finding that the appellants did not establish such a sufficient change in conditions as would require the court, in the exercise of its discretionary equitable powers, to modify or dissolve its earlier decree." *Spangler*, supra, p. 434.

The appellate court's reliance upon this basis for its judgment is further evidenced by subsequent references in the opinion, including:

> "When viewed from the perspective of this long line of Supreme Court authority, we cannot conscientiously hold that the district court abused his broad equitable discretion in refusing to modify or dissolve his Decree." p. 437
>
> "Starting from our earlier premise that the District Court's determination that the School District had not yet effectively discharged its affirmative duty to eliminate segregation was not clearly erroneous, we hold . . . ." p. 439
>
> "On this record, we could not hold that the court abused its discretion in refusing to permit implementation of an alternative plan . . ." p. 440

In the Chattanooga case, the Sixth Circuit, while not referring specifically to Rule 52(a) reflects consideration thereof the following:

> "With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan." (A-C-2)

However, in the Chattanooga case, the appellate court's reliance upon Rule 52(a) in affirming the district court's decision giving final approval to the tentative plan of desegregation from the Chattanooga high schools, was not the sole basis of the Sixth Circuit's opinion. The court found support in the record for the district court's finding that the demographic changes in the city itself were the cause of the remaining imbalance and that such was "beyond the control and responsibility of the School Board." Such was not clearly erroneous.

The opinion of the Sixth Circuit recognizes that the affirmative effort was undertaken to desegregate Riverside and Howard and this affirmative effort was unsuccessful. The opinion also recognizes that while the cause of the departure of white students was disputed, there is no inference that any action of inaction upon the part of the school board contributed to this failure of the affirmative action to effect its desired re-

sults. That the objectionable condition existed in both Riverside and Howard was not questioned by any party. The practicalities referred to in *Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33 (1971), are basically a part of the consideration of the courts in approving the Chattanooga plan as so implemented. This is reflected in the following quote from the Sixth Circuit opinion:

> "What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system." (A-C-6)

In the process of analyzing both the Pasadena and the Chattanooga decisions to isolate the essential character of the conflict between the two holdings with reference to year adjustments and the necessity therefor, the need for clarification of Constitutional principles in the desegregation field is revealed with alarming clarity, particularly in trying to determine what the Constitutional obligation of the Pasadena Board is under the decision of the district court and the appellate court absent clarification by this court.

Is the Pasadena Board under an obligation to make adjustments in its desegregation plan in order to change the majority black schools in its system at the present time? It is clear that the decisions of Judge Real prohibit a majority black school in the system as a Constitutional matter. As long as such Constitutional principle remains without clarification, obviously the Pasadena Board now is in an unconstitutional posture and is under an obligation to do whatever is necessary to correct that Constitutional violation. Thus the Pasadena Board is now under an obligation to make adjustments in those schools where the racial portion is majority black.

"A fixed mathematical racial balance, prohibited by this Court in *Swann*" has become the constitutional requirement in Pasadena.

BUT WHAT CONSTITUTES FULL COMPLIANCE?

The basic issues presented to this Court in the Pasadena case relate to what the Constitution may require in school desegregation cases in order to provide a basis for removing public school systems from continued supervision by District Courts, such supervision having been initially required as a result of *Brown I and II.* Full compliance is the requirement.

In *Swann,* supra, this Court recognized that the time would come when school authorities could be said to "have achieved full compliance with this Court's decision in *Brown I.*" In commenting upon this feature of actuality, this Court did not provide specific guidelines nor detailed description of what would be essential in order for a school board to convince a district court that it had arrived at this status with reference to school desegregation. This Court merely recognized the fact that such a time would come.

Circuit Judge Ely in his majority opinion in Pasadena in Footnote One, pointed out that this issue had not been directly addressed by any Courts of Appeals or by the United States Supreme Court. Judge Ely described the question as "when and under what circumstances a school district may compel a Federal District Court to relinquish jurisdiction and end its supervison, . . ." Again, as pointed out in Footnote Six of the Pasadena case, the Congress of the United States attempted to codify the above referenced language in *Swann.* This codification is reflected in Pub. L. No. 93-380, paragraph 208 (August 21, 1974), 88 Stat. 484.

An examination of this Congressional effort, as contrasted with the actual language set forth in *Swann,* provides reasonably clear evidence of the need for clarification by this Court as to precisely what can be found by district courts to meet the Constitutional requirements of *Brown I and II* so as to justify a holding of full compliance with the consequent dissolution of the injunction, termination of the litigation, and freedom from district court supervision.

Every lawyer representing every school board in the land with desegregation problems must at some time attempt to advise his client of what is required of them based upon an interpretation of this particular portion of *Swann*. The Congressional effort at codification described four conditions as equating full compliance:

1. "school system is desegregated", or
2. "meets the constitutional requirements", or
3. "is a unitary system", or
4. "has no vestiges of a dual system".

All of the above are reasonably complex factual and legal determinations which must in the final analysis be made by a district court. However, it is appropriate to keep in mind that the initial determination as to what a court might conclude satisfies any of the above descriptions, is basic to the advice of legal counsel to school boards. And thus it is the school board that must make this initial determination recognizing that its legal interpretation, and its evaluation of the facts combined, may not satisfy the district court. However, since the Congress is not the body to interpret the Constitution of the United States this codification is of limited guidance, if any, in the course of preparing an opinion as to what the Constitution requires, and particularly the Constitution as described by this Court in *Swann*. The statutory language is so general in meaning that it does not contribute to clarification.

This Court stated in *Swann*, supra, (p. 32) that "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies . . ." But this court imposed two conditions precedent – that (1) "the affirmative duty to desegregate has been accomplished," and (2) further that "racial discrimination through official action is eliminated from the system." How does this concept relate to the full compliance concept?

THE NATURE OF THE DISCRIMINATION WHICH MUST BE ELIMINATED (PRIOR TO FULL COMPLIANCE)

The key concepts in these two conditions are affirmative duty and official action. As CBE interprets this language there is a responsibility upon school boards to undertake an affirmative duty to desegregate; and an effort that is practical, honestly conceived, honestly implemented, and which has reasonable chances of accomplishing the desired goal. That this effort need not completely eliminate racial discrimination per se is implicit in the second condition where the reference is made solely to a particular kind of racial discrimination – that which has occurred "through official action."

It is only the racial discrimination created by the State which is unconstitutional. It is this specific and limited kind of racial segregation that is unconstitutional. Such clearly does not condemn all discrimination based upon race wherever it may exist. The unconstitutionality, the illegality, is limited to such racial discrimination as can be connected in a reasonable fashion with some state action.

This Court has been consistent in making this distinction. To illustrate, in *Green*, supra, where a freedom of choice plan was before the Court in a rural system with only two school buildings, this court stated:

> ". . . the State acting through the local school board and school officials, organized and operated a dual system, . . ." page 435.
>
> "in the context of the State-imposed segregated pattern . . ." page 432.
>
> ". . . then operating State-compelled dual systems . . ." page 432.
>
> ". . . toward disestablishing State-imposed segregation." page 439.

". . . for dismantling the State-imposed dual system . . ." page 439.

". . . and the Court should retain jurisdiction until it is clear that State-imposed segregation has been completely removed." page 439.

"A desegregation program to effectuate conversion of a State-imposed dual system to a unitary, non-racial system . . ." page 441.

The opinion in *Swann*, continues such requirement without any hint of qualification. From reading the opening sentence in *Swann*, it is obvious that this Court was concerned in that opinion solely with school segregation found in "racially separate public schools established and maintained by State action."[19]

That this is the limited segregation under consideration by the Court is further emphasized by the fact that this Court again modifies the word "segregation" whenever it appears in the *Swann* opinion by using it in conjunction with either "State-imposed", "state-enforced", or phrases with similar import. Such appears on pages 11, 13, 14, 15, 18, 21, and repeatedly in the *Swann* opinion.[20]

---

[19] "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of Federal Courts under this Court's mandates to eliminate racially separate schools *established and maintained by state action.*" (Emphasis added) *Swann*, supra, p. 5.

[20] ". . . state-imposed segregation by race in public schools denies equal protection of the laws." p. 11

". . . where dual school systems had historically been maintained by operation of state laws." Such is followed by a quote from *Green* which includes the term 'state-imposed segregation.' p. 13

". . . the massive problem of converting from the state-enforced discrimination . . ." p. 14

". . . to eliminate from the public schools all vestiges of state-imposed segregation . . ." p. 15

". . . the responsibilities of school authorities in desegregating a state-enforced dual school system . . ." p. 18

". . . a potent weapon for creating or maintaining a state-segregated school system . . ." p. 21

AFTER FULL COMPLIANCE

If the state did not cause, create or maintain the segregation, if there is no casual connection between the segregation and the state, such is not within the ambit of the Fourteenth Amendment if language is to be given its ordinary meaning.

Returning to that portion of the *Swann* opinion where reference is made to "year-by-year adjustments," this Court dealt with the future by recognizing that the Federal courts would continue to have power to deal with future problems; but went on to say:

> "But in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by District Courts should not be necessary." (p. 32)

Again the thrust of this language assumes the absolute necessity for State action before a Constitutional violation exists. No contrary interpretation is possible.

Thus after full compliance, when an objectional racial proportion is found to exist, the next step must be an evaluation to determine whether or not the cause of such racial segregation is some form of State action. Then, the burden is upon the objecting party to prove the existence of the State action or some deliberate attempt to fix or alter demographic patterns for the purpose of affecting the racial composition of the schools. Absent such evidence, the district courts are without jurisdiction. There is no default.[21]

---

[21] "In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults." *Swann*, supra, p. 16

The above dictum in *Swann* also is completely consistent with and complements the earlier burden of proof section of *Swann* which deals with desegregation plans (prior to full compliance) coming from school systems with a mixed population and particularly when the desegregation plan contemplates schools described as "all or predominately of one race" or "one race schools", or "schools that are substantially disproportionate in their racial composition", or "schools that all are predominately of one race."[22]

District courts were directed to scrutinize such schools "and the burden upon the school authoritie will be to satisfy the Court that their racial composition is not the result of present or past discriminatory action on their part."[23] Without proven state action such schools were not unconstitutional, even prior to full compliance.

PRACTICALITIES

It should be reasonably clear by now, based upon the experience since 1954, that however commendable it may be to make the effort to remove all vestigial remains of a dual school system, the practicalities of the situation are such that the power necessary to excise from any community all the vestigial remains of a dual school system is seldom available in urban areas.[24] And in any event, desegregation of some objectionable proportion, at least objectionable to some substantial part of the population, will continue to exist for the foreseeable future, regardless of the efforts of school systems or the federal judiciary to achieve a contrary posture.

For a time the effort under *Brown I and II* was confined to the removal of structures created and maintained by the state

---

[22] *Swann*, supra, p. 26.

[23] *Swann*, supra, p. 26.

[24] "Today hindsight highlights the resulting erosion, revealing that *every judicial design* for achieving racial desegregation in this system has failed." *Calhoun*, supra, p. 718.

to perpetuate segregation. What the state had created, it also had the power to alter or destroy. However, such proved inadequate to the task of the elimination of racial segregation. Consequently, affirmative state action was required. Thus, the state addressed its attention to removing discrimination it did not create. Its capabilities in this area have several practical limitations.[25]

Until such time as this reality is recognized and given wide distribution to the minority communities of this country, the continued hope that at some unknown time racial balance can be achieved throughout this country in its public school system, will continue to exist and mislead minority children as to their hopes for the future. When the final recognition does come to the effect that this balance in certain circumstances, is just not possible, there will be discredit to school authorities, to the judiciary, disbelief in the governmental and judicial processes, loss of faith in established authority, and a widespread bitterness because of having been misled. Such bitterness will harm the body politic for too long a period of time.

---

[25] The concluding quotation in the majority opinion in the *Mapp* decision of 10-20-75 (A-C-6) was as follows: "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." *Swann*, supra, 402 U.S. at 23.

"We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds." *Swann*, supra, p. 22.

TERMINATION OF LITIGATION

This Court needs to clarify the facts which will justify a district court in relinquishing jurisdiction over a public school system in public school desegregation cases. It is recognized that there is no magic formula that will give a school board or a district judge a fool proof means for determining when and under what circumstances a petitioning school system is entitled to be free of the supervision of the district court. The factual circumstances existing in Pasadena as compared with the factual circumstances in Chattanooga are indicative of the fact that each school system is different. Such diversity in communities, and in personalities, is basic to the strength of this country. However, the fact that a magic formula is not possible, should not prevent this Court from addressing its collective wisdom to the need for clarification of what an adequate Constitutional remedy in the school desegregation cases shall consist of; coupled with a further definition of what can be characterized as an adequate Constitutional effort upon school boards to meet their Constitutional duty under *Brown I and II*, including the affirmative effort in the design of the desegregation plan, as well as in the good faith effort to implement the plan once approved.

At the same time, the Court could address itself to the results that are acceptable. The respondents understandably have focused their attention upon results, but to the derogation of other aspects of the overall problem.

Results prior to an affirmative effort could be placed in one category and results subsequent to an affirmative effort could be placed in another category. In such circumstance, the Constitutional right and the Constitutional remedy merge, because of the practical aspect of the personal and individual character of racial discrimination. And to excise racial discrimination from individuals poses perhaps man's greatest problem, to date defying the power of religion no less than it continues to defy the power of government and the judiciary.

This Court has understandably extended unprecedented power, authority, and responsibility to district courts in school

desegregation cases. Being sensitive to the agony involved in the exercise of this awesome power and responsibility, this Court has given district court judges the benefit of the doubt in the exercise of these exquisite judgments which are necessary by district courts as they attempt to exercise the court's "facility for adjusting and reconciling public and private needs,"[26] in the field of public education which this Court has described as "perhaps the most single important function of state and local governments.."[27]

It follows that a lawyer attempting to defend before the Courts on appeal a school board that is attempting to uphold the district court is in a better position than a lawyer attempting to overrule the district court. In the Pasadena case the petitioner is seeking to reverse not only the district court, but also a two to one decision of the court of appeals.

PASADENA AND CHATTANOOGA

At the present time in the Chattanooga case, assuming the issues to be essentially the same as Pasadena, since the district court opinion was not satisfactory to the respondents and since the district court opinion was approved by a two to one decision of the court of appeals, the Chattanooga case in its present posture before this Court would be attempting to secure affirmance of the two lower court's decisions, a situation the reverse of the Pasadena case.

The respondents have introduced the Pasadena case into the Chattanooga proceeding by making reference to this Court's decision to grant certiorai on November 11, 1975, in the course of filing an Amended Petition for a Rehearing and a Suggestion of Rehearing En Banc on November 24, 1975.

---

26 "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling *public* and *private* needs. These cases call for the exercise of these traditional attributes of equity power." *Brown II*, supra, p. 300.

27 "Today, education is perhaps the most important function of state and local government." *Brown I*, supra, p. 493.

The respondents have made reference to the second issue as presented by the Pasadena petition which reads as follows:

> "Is a school system required to amend its judicially validated desegregation plan to accommodate for annual demographic changes for which the school system is in no way responsible?"

In said petition, the respondents went on to say:

> "We respectfully suggest that the Court's decision in the Spangler case should clarify the language of Swann, supra, with respect to the need for 'year-by-year adjustments' and provide guidance to this Court in reevaluating its decision in this litigation." (A-B-4)

Thereafter a request for a rehearing was restated along with the suggestion of a desire for a consideration of a rehearing en banc on the basis of the "apparent conflict in this Court's decision with the principles of Swann, supra." And then finally the court was requested that any action on the petition be stayed pending the Supreme Court's decision in *Spangler*.

WHEN IS THE DISTRICT COURT'S SUPERVISION NO LONGER REQUIRED?

After 15 years of litigation, the plaintiffs are seeking a completely new plan of desegregation for the Chattanooga School System. In essence, the plaintiffs resisted demographic changes that might have been associated with white withdrawal from the school system during the course of implementing the desegregation plan by racial decisions. But now that annexation has provided additional white students in the peripheral areas of the Chattanooga School System the plaintiffs desire to amend the plan for the purpose of continuing their battle for racial balance under any and all circumstances. Results are their only interest.

And this is in a school system that was judicially declared in compliance with the law by the court of appeals in 1967 with the exception of the teacher desegregation aspect. And further, this school system considered itself to be in full compliance (with the exception of teacher desegregation) until subsequent to the *Green* decision in 1968 and more specifically the *Swann* decision by this Court on April 20, 1971 when the affirmative action aspect of the School Board's Constitutional obligation was clearly defined. And yet even after approval by the district court and a two to one decision of the court of appeals, the plaintiffs continue to retain the petitioners in court seeking an amended plan of desegregation.

The plaintiffs' request for a postponement perhaps reflects the hope that this Court might use language in the Pasadena case that would resurrect a continuing effort by plaintiffs in the Chattanooga case. Such could well indicate a concern that the probability of language favorable to plaintiffs' position in the year-to-year adjustment area would have a higher probability of taking place in a case where the school board had lost at the district court level and at the appellate court level. That this speculation could have some reasonable basis in fact encourages CBE to file this Amicus Brief for the purpose of getting the Chattanooga facts before this Court for such assistance as these facts might be.

CBE joins Pasadena in its desire to have clarification in the issues raised in the petition. Action at the district court level is, in the Chattanooga case, the ultimate reality. In each event where an appeal has taken place, CBE has proceeded to implement the district court order. The appellate process has never been used as an excuse for delay. Whatever delay has taken place has only taken place pursuant to the one stay granted by the district court or pursuant to the time that it took for the district court to review the legal interpretations of the Chattanooga Board and make a determination as to the extent which the Chattanooga Board's interpretation was Constitutionally permissible or otherwise.

To the extent possible litigation in this area should be minimized. In any event, termination of litigation at the district court level is highly desirable to the extent that such can be consistent with the Constitutional obligations imposed by *Brown I and II*. If school authorities and the district courts are to meet their responsibility, clarification of the issues set forth in the Pasadena case are badly needed, but these issues must be clarified in terms of the impact upon all school systems and not just the Pasadena School System since the facts in Pasadena are obviously unique to that community.

CONCLUSION

The jurisdiction of the Federal Courts in school desegregation cases exists only because a school board is in default of its constitutional obligations. As long as dual zones were operative the default was obvious and no further proof was needed. The student racial segregation was obvious and complete.

Once the dual zones (creatures of the state) were terminated and school student assignments were made without regard to race, there was a reasonable basis for assuming that a status of compliance had been achieved and default no longer existed. But racial segregation persisted in schools after the dual zones were disestablished. The remedy was inadequate.

The affirmative aspect of the obligation was initially identified in *Green*, supra, and given detail and substance in *Swann*, supra. School authorities moved into areas of racial discrimination outside the scope of state action via creation or maintenance. While the results of private discrimination was reflected in the racial composition of the schools, the basic cause was not state action, but individual decisions. The white students who did not accept their assignments to Riverside and Howard by moving their residences were not committing an illegal act. On the contrary, their parents were exercising a basic American freedom – "Where shall I reside?"

While CBE could terminate dual zones since such were the result of its own action, many other segregation-producing facts were not within the power of CBE to alter. Such have proven to be the practicalities inherent in an area where the reconciliation of public and private needs is involved.

State action is a limiting factor where the constitutional right is concerned. The state has practical limits upon its capability to bring about change. Thus state action is also a limiting factor upon the remedy becoming a reality.

The Chattanooga Board of Education, as Amicus Curiae, urges this Court to provide clarification of the constitutional obligation of school authorities and district courts for such is essential to the quality of the educational opportunity in our public school system. But such clarification should reflect the variety in communities, as well as the varied responses of school boards to their duties under *Brown I and II*.

Respectfully submitted,

RAYMOND B. WITT, JR.

WITT, GAITHER, RICHARDSON, HENNISS & WHITAKER

1100 American National Bank Bldg.
Chattanooga, Tennessee 37402

Attorneys for the Board of Education of the City of Chattanooga

December 24, 1975.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, ET AL,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, ET AL,
Defendants-Appellees.

MOTION FOR REHEARING OR REHEARING EN BANC AND FOR LEAVE TO FILE AMENDMENT TO THIS MOTION OUT OF TIME

Plaintiffs-Appellants, by their undersigned counsel, respectfully pray that pursuant to Rules 2, 26(b), and 40(a), F.R.A.P., this Court enter its Order granting them a Rehearing or Rehearing *En Banc* in this case and also grant them leave to file an Amendment to this Motion out of time and, in support thereof, would respectfully show the Court as follows:

1. The instant appeal is one of numerous appeals and cross appeals involving implementation of a system-wide desegregation decree in the City of Chattanooga School System. It

involves, in part, the implementation of effective desegregation in the High Schools of said System.[1] By this appeal plaintiffs sought, in part, to reverse the Judgment of the District Court approving an ineffective desegregation plan for the High Schools of Chattanooga, and excluding from the operation of the desegregation plan areas annexed to the School System (either after the framing of the decree but before its full implementation, or during the initial stages of compliance therewith) which are overwhelmingly white, when schools serving such annexed areas will thereby have student populations substantially disproportionate to the System-wide racial composition.

2. As said by Judge Edwards, dissenting from the majority Opinion filed 20 October 1975, affirming said District Court Judgment:

> "With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this Court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."
>
> *The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mo-*

[1] A Three-Judge panel of this Court had disapproved and remanded a December 1973 District Court Order effecting realistic desegregation in Elementary and Junior High Schools, resulting in a rehearing *en banc* wherein the action of said panel was reversed and the Elementary-Junior High School Plan was approved. At that time the District Judge had not approved any final desegregation plan for the High Schools. *Mapp* v. *Board of Education of Chattanooga*, 477 F.2nd 851 (Sixth Circuit 1973) cert. den., 414 U.S. 1022 (1973).

> *bility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)" (Emphasis Added)[2]

The majority decision in said October 20, 1975, Opinion of the panel in this case simply cannot be squared with said Opinions of the Supreme Court cited by Judge Edwards in his dissenting Opinion and other Opinions such as *Davis* v. *Board of School Commissioners of Mobile*, 402 U.S. 33 (1971); *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973) and *Wright* v. *Council of the City of Emporia*, 407 U.S. 451 (1972). Said majority Opinion is also in conflict with other decisions of this Court (*Monroe* v. *Board of Commissioners of Jackson*, (Sixth Circuit 1970) 427 F.2nd 1005, *Monroe* v. *Board of Commissioners of Jackson*, 505 F.2nd 105 (Sixth Circuit 1974); *Monroe* v. *County Board of Education of Madison County, Tennessee* (Sixth Circuit 1974) 505 F.2nd 109; *Newburg Area Council* v. *Board of Education of Jefferson County* (Sixth Circuit 1973) 489 F.2nd 925, *vacated and remanded on other grounds*, — U.S. — (1974); *Brinkman* v. *Gilligan* (Sixth Circuit 1975) — F.2nd —. *Kelley* v. *Metro Board* (CA 6, 1972) 463 F2d 732, cert. denied 409 U.S. 1001.

3. Due to routing difficulties, said Opinion of October 20, 1975, did not reach the New York Counsel of Plaintiffs-Appellants until Thursday, 30 October 1975 and, due to con-

[2] The majority opinion admits that the final plan for high school desegregation from which the black plaintiffs appealed leaves the two formerly black High Schools, Howard and Riverside, established as such during dejure segregation, in the following condition as compared to Brainerd and Chattanooga, the two white High Schools:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High School	99%	1%
Riverside High School	99%	1%

tinual Court commitments in Federal and State Court at Nashville, it has been impossible for said Nashville Counsel to reach the preparation of this Motion prior to the date hereinabove.

WHEREFORE plaintiffs-appellants respectfully pray that this Court enter its Order granting them said Rehearing or Rehearing En Banc in the above entitled appeal and allow this Motion to be amended within twenty days after the date hereinbelow.

Respectfully submitted,

/s/ AVON N. WILLIAMS, JR.
404 James Robertson Parkway
Nashville, Tennessee 37219

JACK GREENBERG
JAMES M. NABRIT, III
DREW DAYS
10 Columbus Circle
Suite 2030
New York, New York 10019

Attorneys for Plaintiffs-Appellants

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Avon N. Williams, Jr. makes oath that the statements contained in the above Motion are true.

/s/ AVON N. WILLIAMS, JR.

Sworn to and subscribed before
me this 3rd day of November 1975.

/s/ CAROLINE D. HAYNES
Notary Public
Commission Expires: 10-25-76

Certificate of Service

I hereby certify that on the 3rd day of November 1975 I served copies of the foregoing Motion For Rehearing Or Rehearing *En Banc* and For Leave To File Amendment To This Motion Out Of Time, upon counsel for the respective parties herein, as follows:

Raymond B. Witt, Jr., Esquire
W. Frank Brown, III, Esquire
1100 American National Bank Bldg.
Chattanooga, Tennessee 37402

Eugene N. Collins, Esquire
400 Pioneer Bank Bldg.
Chattanooga, Tennessee 37402

via United States mail, first-class postage prepaid.

/s/ AVON N. WILLIAMS, JR.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 74-2100

JAMES JONATHAN MAPP, et al.,
Plaintiffs-Appellants,

v.

THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, et al.,
Defendants-Appellees.

On Appeal From the United States District Court For The Eastern District of Tennessee

AMENDED PETITION FOR REHEAHING AND SUGGESTION OF REHEARING EN BANC

Plaintiffs-Appellants, by their undersigned counsel, respectfully pray that, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, this Court enter its order granting them a Rehearing and Rehearing *En Banc* in this case, and, in support thereof would respectfully show the Court as follows:

1. Numerous decisions of the Supreme Court and of this Court (previously cited in our original petition for rehearing amended hereby) have established that school boards have a constitutional duty to eradicate vestiges of their dual system "root and branch" and to implement plans that will "work realistically and work realistically now" to achieve that end. Furthermore, the same decisions have emphasized that a school district's compliance with the requirements of *Brown* v. *Board*

of Education, 347 U.S. 483 (1954) and its progency must be judged by results not promises nor projections. They have stressed that where a board fails using one approach to achieve desegregation, it can satisfy its constitutional duty only by resorting to other feasible, viable and judically-approved techniques to achieve "the greatest degree of actual desegregation."

2. As the facts clearly establish in this case, the Chattanooga Board of Education has *never* altered the one-race, dual character of its high schools. The four high schools at issue here were one-race facilities under the dual system and remain so today. The Board's freedom of choice and geographic zoning plans have glaringly failed to alter the racial compositions of these schools. Nevertheless, it has eschewed, with lower court approval, any reliance upon other judicially-approved remedies such as pairing, clustering, transportation or alteration of feeder patterns from lower grades to the high schools that have proven effective in other districts in satisfying constitutional requirements.

3. This Court has established, by affirming the trial court's approval of a plan that fails to do the job *Brown, supra* mandates, the principle that a board can achieve unitary status without making *any* appreciable change in the character of its schools from their one-race composition under state-imposed segregation. It has given its judicial seal of approval to the proposition that demographic changes and "white flight" can, absent any meaningful desegregation of the system as a result of school board action, convert a dual system to a unitary system.

4. With all due respect, we submit that this Court has, in so doing, violated the spirit and letter of the Supreme Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) where it stated:

> It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required

> to make year-by-year adjustments of the racial composition of student bodies *once the affirmative duty to desegregate* has been *accomplished and racial discrimination through official action is eliminated from the system. Id,* at 32. [Emphasis added]

We suggest that the foregoing language from the *Swann* decision reflects the Supreme Court's view that *something* must happen — meaningful desegregation — before a system can be declared unitary and the need for "year-by-year" adjustments and judicial oversight ceases. Until meaningful desegregation occurs, year-by-year adjustments may be necessary, the Court seems to envision. Yet this Court has rejected such an approach in this litigation.

5. The issue decided by this Court is presently before the United States Supreme Court in the case of *Pasadena City Board of Education* v. *Spangler*, No. 75-164 *cert. granted* 44 U.S.L.W. 3271 (November 11, 1975). One of the questions presented there is as follows:

> (2) Is school system required to amend its judicially validated desegregation plans to accommodate for annual demographic changes for which it is in no way responsible? *Id*, at 3271.

We respectfully suggest that the Court's decision in the *Spangler* case should clarify the language of *Swann, supra* with respect to the need for "year-by-year" adjustments and provide guidance to this Court in reevaluating its decision in this litigation.

Conclusion

For the foregoing reasons, we respectfully request that the petition for rehearing be granted and that the suggestion of rehearing *en banc* be duly considered in light of the apparent conflict in this Court's decision with the principles of *Swann, supra*. Furthermore, we request that any action on this petition be stayed pending the Supreme Court's decision in *Spangler, supra.*

Respectfully submitted,

/s/ DREW S. DAYS, III
JACK GREENBERG
JAMES M. NABRIT, III
DREW S. DAYS, III
Suite 2030
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, JR.
404 James Robertson Parkway
Nashville, Tennessee 37219

Attorneys for Plaintiffs-Appellants

Certificate of Service

This is to certify that on the 21st day of November, 1975, I served two copies of the foregoing "Amended Petition for Rehearing and Suggestion of Rehearing *En Banc*" upon the following counsel of record by United States mail, postage prepaid:

Raymond B. Witt, Jr., Esq.
W. Frank Brown, III, Esq.
1100 American National Bank Bldg.
Chattanooga, Tennessee 37402

Eugene W. Collins, Esq.
400 Pioneer Bank Bldg.
Chattanooga, Tennessee 37402

/s/ DREW S. DAYS, III
Attorneys for Plaintiffs-Appellants

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 74-2100 and 74-2101

JAMES JONATHAN MAPP, et al,
Plaintiffs-Appellants (74-2100),
Plaintiffs-Appellees (74-2101),
v.
THE BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, et al,
Defendants-Appellees (74-2100),
Defendants-Appellants (74-2101).

APPEAL from the United States District Court for the Eastern District of Tennessee.

Decided and Filed October 20, 1975.

Before: WEICK, EDWARDS and ENGEL, Circuit Judges.

ENGEL, Circuit Judge, delivered the opinion of the Court in which WEICK, Circuit Judge, joined. EDWARDS, Circuit Judge (pp. 16a-26a), delivered a separate dissenting opinion.

ENGEL, Circuit Judge. This desegregation case is once more before the court,[1] this time on cross-appeals from an order of the district court entered June 24, 1974. That order denied motions filed by both parties to modify or amend an earlier order of the court entered December 18, 1973, directed implementation of the final school desegregation plan previously approved by the court with certain modifications. The December 18, 1973 order provided as well that "[To] the extent the Court has previously given only tentative approval to the High School Zoning Plan, the same is now approved finally."

[1] For previous decisions of this court in this litigation see *Mapp* v. *Board of Education of Chattanooga*, 295 F. 2d 617 (6th Cir. 1961), 319 F. 2d 571 (6th Cir. 1963), 373 F. 2d 75 (6th Cir. 1967), 477 F. 2d 851 (6th Cir. 1973), *cert. denied* 414 U.S. 1022.

Both appeals in effect seek to relitigate all of those same issues which we decided in an en banc decision in this court, reported in *Mapp* v. *Board of Education of Chattanooga*, 477 F. 2d 851 (6th Cir. 1973), *cert. denied*, 414 U.S. 1022 (1973). We there affirmed a final plan of desegregation in all respects except as to the high schools in Chattanooga.

While the district judge had at that time approved the plan as to Kirkman Technical High School, and our affirmance made the same final, District Judge Frank W. Wilson had given only tentative approval to the plan for desegregation for other high schools in the City of Chattanooga, see *Mapp* v. *Board of Education of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972), being uncertain particularly whether three rather than four general purpose high schools would be feasible or desirable in Chattanooga.

With respect to Judge Wilson's refusal to modify the previous final plan of desegregation, we find that he did not abuse his discretion in so doing, particularly since this court has given its approval of that plan.

Accordingly, we see as the sole issue remaining on this appeal the question of whether the district judge erred in ordering final approval of the tentative plan of desegregation for the Chattanooga high schools.

At the time the tentative plan was proposed, it was anticipated that the zoning for the four high schools would produce a racial balance approximately as follows:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

When, however, the plan was placed into effect in the fall of 1971 rather than having the attendance anticipated, the four high schools experienced the following racial balance:

	Black Students	White Students
Brainerd High School	39%	61%
Chattanooga High School	43%	57%
Howard High School	99%	1%
Riverside High School	99%	1%

While an actual head count had showed that as late as July 1971 there were 393 (29%) white high school students in the Howard High School zone and 311 (29%) white students in the Riverside zone, only ten reported that September to Howard and three to Riverside.

It is the contention of the plaintiffs that a school board's duty in a previously dual and segregated school system cannot be said to have been performed where, after implementation of a plan of desegregation, such an imbalance in the racial mix of the students yet remains. After taking extensive testimony on this issue and on the other issues raised by the parties' motions to amend the earlier judgment, Judge Wilson, in his Memorandum Opinion of November 16, 1973, made the following findings of fact:

> To the extent that the Court has previously given only tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including

> the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.

While the cause of the departure of white students was disputed, there can be little doubt upon the record that the difference between the anticipated mix and the actual attendance of the high schools when the plan was put into effect was due to a substantial departure of white students from the public schools in Chattanooga, a circumstance which the district judge found to have occurred beyond the control and responsibility of the School Board.

No one who firmly believes in the social and educational value of racial balance in a desegregated school system can help being seriously concerned when such a plan for achieving racial balance does not achieve its objectives on implementation. That such a concern was shared by the district judge is manifest throughout the entire record upon appeal. Nevertheless, the district judge concluded that the demographic changes in the city itself were the cause of the remaining imbalance, a finding which finds support in the record and which we hold is not clearly erroneous.

We are satisfied that, in giving final approval to the high school desegregation plan, Judge Wilson was by no means yielding to irrational concerns over white flight which merely masked inherent Board resistance to integration. To the contrary, he carried out the plan in spite of the apprehended result, and beyond that resisted the defendant Board's further efforts to modify the earlier approved plan for the remainder of the system with this language in his November 27, 1973 opinion:

"The Court is not unsympathetic to the concern expressed by the Board for minimizing the voluntary departure of white students from the system. It must be apparent, however, that this objective cannot serve as a limiting factor on the constitutional requirement of equal protection of the laws, nor as a justification for retaining *de jure* segregation. Concern over "white flight", as the phenomenon was often referred to in the record, cannot become the higher value at the expense of rendering equal protection of the laws the lower value. As stated by the United States Supreme Court in the case of *Monroe* v. *Board of Commissioners,* 391 U.S. 450. . . :

> 'We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. 'But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of the disagreement with them.' *Brown II* at 300, . . .
>
> "Moreover, it is the 'effective disestablishment of a dual racially segregated school system' that is required, *Wright* v. *Council of City of Emporia,* 407 U.S. 451 . . . not, as seems to be contended by the defendants, the most 'effective' level of voluntarily acceptable 'mixing' of the races." (Footnote omitted)

Having implemented the plan for desegregating the high schools by establishing zones for attendances which were designed to achieve a high degree of racial balance throughout the system, and having provided further for continuance of a majority-to-minority transfer policy, the district judge conceived that he had obeyed the mandate of *Brown* v. *Board of Education of Topeka II,* 349 U.S. 294 (1955) *(Brown II)* and more particularly of *Swann* v. *Charlotte-Mecklinburg of Education,* 402 U.S. 1 (1971). So do we. Presumably, the district judge might have ordered a further realignment when the first plan did not achieve the proper balance ratio, and yet

another if that did not hold. Indeed if such were found to have been required to carry out the constitutional mandate to eliminate the vestiges of a dual system, it would simply have to be done, and we have no doubt the district judge would faithfully have carried out that duty. What he was finally faced with here, however, was rather a more subtle and lingering malaise of fear and bias in the private sector which persisted after curative action had been taken to eliminate the dual system itself. *Swann* v. *Board of Education* recognizes that this latter may be beyond the effective reach of the Equal Protection Clause:

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools."
>
> *Swann* v. *Board of Education, supra,* 402 U.S. at 23

Affirmed.

EDWARDS, Circuit Judge, dissenting. This appeal presents just one significant question: Should we now, under applicable Supreme Court precedent, affirm the District Judge's final order of December 18, 1973, approving a final desegregation order applicable to the Chattanooga high schools?

With all respect for the sincerity of my colleagues, I cannot join the majority opinion, or approve its result. If the majority opinion prevails in this court and in the Supreme Court, it will establish as law the proposition that approximately 60% of the black children in the high schools of the Chattanooga public school system may be continued forever in complete racial segregation in all black schools which were built as such under state law which required a racially dual school system and which have been continuously segregated as such down to this very moment. I cannot square this proposition with the great command of the Fourteenth Amendment to provide all American citizens "the equal protection of the laws."

The rule of this case is all the more significant because the smaller numbers, the maturity, and the greater mobility of high school students tend to make practical accomplishment of high school desegregation the least difficult part of the task mandated by *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954); *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968) and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The in banc per curiam opinion of the Sixth Circuit (*Mapp* v. *Board of Education of the City of Chattanooga, Tennessee*, 477 F.2d 851 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973)) constituted unqualified approval of two previously entered opinions and judgments of Judge Wilson, *Mapp* v. *Board of Education of the City of Chattanooga*, 329 F. Supp. 1374 (E.D. Tenn. 1971); *Mapp* v. *Board of Education of the City of Chattanooga*, 341 F. Supp. 193 (E.D. Tenn. 1972). In these two cases Judge Wilson had approved final desegregation orders concerning the grade schools and junior high schools. Equally

clearly, he had not approved any final desegregation plan for the high schools. As to the high schools, in his first opinion he said:

High Schools

> During the school year 1970-71, the Chattanooga School System operated five high schools. These included four general curricula high schools and one technical high school. Kirkman Technical High School offers a specialized curricula in the technical and vocational field and is the only school of its kind in the system. It draws its students from all areas of the City and is open to all students in the City on a wholly non-discriminatory basis pursuant to prior orders of this Court. Last year Kirkman Technical High school had an enrollment of 1218 students, of which 129 were black and 1089 were white. The relatively low enrollment of black students was due in part to the fact that Howard High School and Riverside High School, both of which were all black high schools last year, offered many of the same technical and vocational courses as were offered at Kirkman. Under the defendants' plan these programs will be concentrated at Kirkman with the result that the enrollment at Kirkman is expected to rise to 1646 students, with a racial composition of 45% black students and 55% white students. No issue exists in the case but that Kirkman Technical High School is a specialized school, that it is fully desegregated, and that it is a unitary school.
>
> While some variation in the curricula exists, the remaining four high schools, City High School, Brainerd High School, Howard High School, and Riverside High School, each offer a similar general high school curriculum. At the time when a dual school system was operated by the School Board, City High School and Brainerd High School were operated as white schools and Howard High School and Riverside High School were operated as black schools. At that time the black high schools were zoned, but the white high schools were not. When the dual school sys-

tem was abolished by order of the Court in 1962, the defendants proposed and the Court approved a freedom of choice plan with regard to the high schools. The plan accomplished some desegregation of the former white high schools, with City having 141 black students out of an enrollment of 1435 and Brainerd having 184 black students out of an enrollment of 1344 during the 1970-71 school year. However, both Howard, with an enrollment of 1313, and Riverside, with an enrollment of 1057, remained all black. The freedom of choice plan "having failed to undo segregation • • • freedom of choice must be held unacceptable." Green v. County School Board of New Kent County, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968).

The School Board proposes to accomplish a unitary school system within the high schools by zoning the four general curricula high schools with the following results in terms of student ratios:

	Black Students	White Students
Brainerd High School	32%	68%
Chattanooga High School	44%	56%
Howard High School	75%	25%
Riverside High School	75%	25%

The plaintiffs have interposed objections to the defendants' high school plan upon the ground that it does not achieve a racial balance in each school. To some extent these objections are based upon matters of educational policy rather than legal requirements. It is of course apparent that the former white high schools, particularly Brainerd High School, remain predominantly white and that the former black high schools remain predominantly black. However, the defendants offer some evidence in support of the burden cast upon them to justify the remaining imbalance. The need for tying the high school zones to feeder junior high schools is part of the defendants' explanation. Residential patterns, natural geographical features, arterial highways, and other factors are also part of the defendants' explanation.

A matter that has given concern to the Court, however, and which the Court feels is not adequately covered in the present record, is the extent to which the statistical data upon which the defendants' plan is based will correspond with actual experience. Among other matters there appears to be substantial unused capacity in one or more of the city high schools. Before the Court can properly evaluate the reliability of the statistical data regarding the high schools, the Court needs to know whether the unused capacity does in fact exist and, if so, where it exists, whether it will be used and, if so, how it will be used. It would be unfortunate indeed if experience shortly proved the statistical data inadequate and inaccurate and this Court was deprived of the opportunity of considering those matters until on some appellate remand, as occurred in the recent case of Davis v. Board of School Commissioners of Mobile, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577.

The plaintiff has submitted a high school plan with high school zones which the plaintiff's witness has testified will achieve a racial balance in each high school. However, this plan is not tied into the junior high school plan hereinabove approved and the Court is unable to say whether it could be so tied in. Furthermore, the same statistical problem discussed above would appear to exist with regard to the plaintiff's plan.

The Court accordingly is unable to give final approval to a high school desegregation plan at this time. Time, however, is a pressing factor. Pre-school activities will commence at each high school within less than a week, if in fact they have not already commenced. Full commencement of the fall term is only one month away. It is clear that the high schools must move at least as far as is proposed in the defendants' high school plan. Accordingly, the Court will give tentative approval only at this time to the defendants' high school plan in order that at least as much as is therein proposed may be placed into operation at the commencement of the September 1971

term of school. Further prompt but orderly judicial proceedings must ensue before the Court can decide upon a final plan for desegregation of the high schools.

In the meanwhile, the defendants will be required to promptly provide the Court with information upon the student capacity of each of the four high schools under discussion, upon the amount of unused space in each of the four high schools, the suitability of such space for use in high school programs, and the proposed use to be made of such space, if any. In this connection the defendants should likewise advise the Court regarding its plan as to tuition students. Last year almost one-third of the total student body at City High School were non-resident tuition paying students. There is no information in the present record as to the extent the Board proposes to admit tuition students nor the effect this might have on the racial composition of the student body. The Court has no disapproval of the admission of tuition students nor to the giving of preference to senior students in this regard, provided that the same does not materially and unfavorably distort the student racial ratios in the respective schools. Otherwise, the matter of admitting tuition students addresses itself solely to the discretion of the Board. No later than the 10th day of enrollment the defendants will provide the Court with actual enrollment data upon each of the four high schools here under discussion.

Mapp v. *Board of Education of the City of Chattanooga, supra* at 1384-86.

In his second opinion he said:

> Tentative approval only having heretofore been given to the School Board plan for desegregation of the Chattanooga high schools other than Kirkman Technical High School (to which final approval has been given). Further consideration must be given to this phase of the plan. At the time that the Court gave its tentative approval to the high school desegregation plan, the Court desired additional information from the Board of Education as to whether three, rather than four, general purpose high schools would be feasible or desirable in Chattanooga. It now appears, and in this both parties are in agreement, that three general purpose high schools rather than four is not feasible or desirable, at least for the present school year. Having resolved this matter to the satisfaction of the Court, the defendant Board of Education will accordingly submit a further report on or before June 15, 1972, in which they either demonstrate that any racial imbalance remaining in the four general purpose high schools is not the result of "present or past discriminatory action on their part" Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d 554 at 572, or otherwise, and to the extent that the Board is unable to demonstrate that such racial imbalance which remains is not the result of past or present discriminatory action, they should submit a further plan for removal of all such remaining racial discrimination, the further plan likewise to be submitted on or before June 15, 1972.
> *Mapp* v. *Board of Education of the City of Chattanooga, supra* at 200.

The opinion and order we now review are quite different, and if approved by this Court and the Supreme Court, would represent both a final approval of the school board's current "plan" for operation of the high schools and holding that the present operation represents desegregation of the previously legally segregated dual high school system.

In the opinion we now review Judge Wilson said:

> The Court is accordingly of the opinion that the defendants have failed to establish either such changed conditions as would render its formerly court-approved plan of school desegregation inadequate or improper to remove "all remaining vestiges of state imposed segregation" or that its newly proposed plan would accomplish that result.
>
> To the extent that the Court has previously given only

tentative approval to the high school zoning plan, final approval will now be given that plan. Two high schools, Howard High School and Riverside High School, have not acquired an enrollment of white students as projected by the Board when the plan was proposed in 1971, but rather have remained substantially all black. It was a concern for the accuracy of these projections that caused the Court to initially give only tentative approval to the high school zoning plan. However, subsequent evidence has now demonstrated that changing demographic conditions within the City and other *de facto* conditions beyond the control and responsibility of the School Board, including the voluntary withdrawal of white students from the system, have become the causative factors for the present racial composition of the student body in those schools and not the original action of the Board in creating segregated schools at these locations. It should be recalled in this connection that the plan previously approved included provision for students to elect to transfer from a school in which they were in a majority to a school in which they would be in a minority.
Mapp v. *Board of Education of the City of Chattanooga*, 366 F. Supp. 1257, 1260-61 (E.D. Tenn. 1973).

Thus, clearly, we now have before us the issue as to whether or not in the Chattanooga high schools previous unconstitutional segregation has been eliminated "root and branch." *Green* v. *County School Board of New Kent County*, 391 U.S. 430 (1968).

Defendants-appellees accept (as they must) the responsibility of meeting the standard of *Green* v. *County School Board of Kent County, supra*:

> It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's "freedom-of-choice" plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may "freely" choose the school he will attend. The

Board attempts to cast the issue in its broadest form by arguing that its "freedom-of-choice" plan may be faulted only by reading the Fourteenth Amendment as universally requiring "compulsory integration," a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II*. In the light of the command of that case, what is involved here is the question whether the Board has achieved the "racially nondiscriminatory school system" *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. See *Cooper* v. *Aaron, supra*, at 7; *Bradley* v. *School Board*, 382 U.S. 103; cf. *Watson* v. *City of Memphis*, 373 U.S. 526. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.[4]

---

[4] "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U. S. 145, 154. Compare the remedies discussed in, *e. g.*, *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Standard Oil Co.* v. *United States*, 221 U. S. 1. See also *Griffin* v. *County School Board*, 377 U. S. 218, 232-234.